Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
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Carriage of the Transmissions	)	
of Digital Television Broadcast Stations	)	CS Docket No. 98-120
	)	
Amendments to Part 76	)	
of the Commission's Rules	)	
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REPLY COMMENTS OF AMERITECH NEW MEDIA

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Ameritech New Media, Inc. ("Ameritech") respectfully submits these reply comments in response to the Notice of Proposed Rulemaking, FCC 98-153, released in the above-captioned docket on July 10, 1998 ("Notice").[1]

I. INTRODUCTION AND SUMMARY.

In its initial comments, Ameritech demonstrated that the Commission's digital television (DTV) policy has taken on a life of its own, advancing forward regardless of the consequences for and rights of consumers, cable programming networks and cable operators. As opposition to government-imposed DTV has grown, the broadcasters have embarked on a go-for-broke, no-holds-barred strategy of attempting to convince the Commission that nothing less than immediate, simultaneous carriage of analog and digital signals (including multicasted digital signals with multiple streams of programming) is essential for the transition to digital broadcasting and the ultimate return of analog spectrum to succeed.

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[1] *In the Matter of Carriage of the Transmissions of Digital Television Broadcast Stations, Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120, FCC 98-153 (rel. July 10, 1998).

To support their position, broadcasters do not offer facts, but rather shrill and empty rhetoric about the imminent demise of digital broadcasting and the dim prospects for broadcasting generally if the Commission fails to order immediate carriage of DTV signals during the transition.[2] They further offer a strained interpretation of the must carry provisions, seeking to rewrite them to extend signal carriage obligations far beyond what Congress intended or the plain language of the statute would allow, and to curtail, if not eliminate altogether, limitations intended by Congress to minimize the burdens of the must carry regime on cable operators – limitations that were integral to the Supreme Court's decision to uphold the must carry requirements. They also assert alternatively that the Commission is bound by the Supreme Court's decision in *Turner II*[3] and Congress's findings concerning the need for must carry to conclude that digital signal carriage during the transition is both necessary and constitutional, or that digital must carry is constitutional under *Turner II* because it imposes *de minimis* burdens on the First Amendment rights of cable operators and programmers.

The broadcasters' hollow claims and legal analysis are, however, wholly without merit. As Ameritech, other cable operators, cable programming networks, public interest groups, and at least one broadcaster, pointed out in their initial comments, any digital signal carriage requirement imposed during the transition would far exceed the Commission's statutory authority, violate the First Amendment rights of cable operators

[2] *See* Comments of the National Association of Broadcasters (NAB) at 1-2 ("without must carry rules (and the early certainty that there *will* be must carry during the DTV transition), the digital transition and return of the analog spectrum that both Congress and the FCC have planned will . . . turn to 'toast.'") (emphasis in original).

[3] *Turner Broadcasting System v. Federal Communications Commission*, 117 S. Ct. 1174 (1997) (*Turner II*).

and programmers, and constitute a taking under the Fifth Amendment.[4] Imposing digital signal carriage requirements at this point would, moreover, be entirely premature because of uncertainty concerning the development and public acceptance of DTV, as well as the resolution of key technical and operational issues. Consequently, even if the Commission had authority to propound digital signal carriage requirements during the transition, which it does not, implementation of such requirements would not be in the public interest.

Ameritech does not intend to rehash here the myriad legal, constitutional and policy arguments against transitional digital signal carriage offered by cable operators, programmers, public interest groups and some broadcasters. Nevertheless, it feels compelled to address some of the more egregious arguments offered by broadcasters to support DTV must carry during the transition in order to correct various misstatements of fact, and incorrect interpretations of law.

II. THE COMMISSION LACKS STATUTORY AUTHORITY TO IMPOSE DIGITAL SIGNAL CARRIAGE REQUIREMENTS ON CABLE OPERATORS DURING THE TRANSITION PERIOD.

In its initial comments, Ameritech showed that neither section 614, nor section 309, nor any other provision of the Communications Act, as amended, grants the Commission authority to order cable operators to carry DTV signals during the transition period. Rather, as contemplated by section 614(b)(4)(B), the Commission only has authority to amend its signal carriage rules to provide for carriage of digital broadcast

[4] Although it did not address the issue in its opening comments, Ameritech fully supports Professor Tribe's analysis in the National Cable Television Association's (NCTA) comments that requiring simultaneous carriage of broadcasters' analog and digital signals would run afoul of the Fifth Amendment. Comments of the National Cable Television Association (NCTA Comments) at 32-37; *see also* Comments of the Cable Telecommunications Association (CATA Comments) at 17-26, and Comments of Time Warner Cable (Time Warner Comments) at 26-30.

signals once a station has fully converted to digital and stopped broadcasting an analog signal, and not during an amorphous, and likely lengthy, transition period.[5]

Not surprisingly, the broadcasters, offering a tortured and highly selective reading of the statute, assert that immediate carriage of the DTV signals of local commercial broadcast stations is mandated by section 614.[6] Specifically, they claim that the terms of the must carry provisions apply, without distinction, to every local commercial television "signal licensed and operating on a channel regularly assigned to its community by the Commission," and that new DTV signals fit easily within this definition.[7] They further assert that the Cable Act expressly contemplated carriage of local stations' DTV signals, requiring the Commission to initiate a proceeding to modify the must carry requirements as necessary "'to ensure cable carriage of such broadcast signals of local commercial television stations . . .."[8] Finally, they claim that Congress was clear about which local broadcast signals were to be excluded from carriage in section 614(h)(1)(B), and did not specifically exclude DTV signals, although Congress was aware of their imminence when it adopted that provision.[9]

The broadcasters' contention that section 614 requires immediate carriage of digital broadcast signals is, however, completely at odds with the plain language of section 614 and the underlying goals of the must carry provisions. Section 614(b)(4)(B),

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[5] Ameritech Comments at 5-7.

[6] *See e.g.* NAB Comments at 2-3, Comments of the Association of Local Television Stations, Inc. (ALTV) at 7.

[7] *See e.g.* NAB Comments at 2-3, ALTV Comments at 7.

[8] ALTV Comments at 8 (citing section 614(b)(4)(B)). Ameritech observes that ALTV disingenuously fails to quote fully the language of section 614(b)(4)(B).

[9] ALTV Comments at 8, NAB Comments at 3.

which is the only provision of the 1992 Cable Act that specifically addresses ATV, provides that the Commission is to modify the must carry requirements of cable television systems as necessary to ensure cable carriage of "*such broadcast signals* of local television stations *which have been changed to conform* with [the Commission's] modified [ATV]standards."[10] The phrase "such broadcast signals," as MediaOne and others aptly observe, refers back to "television broadcast signals," which can only describe the analog service in existence at the time the must carry provisions were enacted.[11] Furthermore, the phrase "which have been changed" unambiguously indicates that Congress intended any changes to the Commission's must carry rules to apply only after a station has completed the transition to digital broadcasting and ceased its analog transmission.[12] The plain language of the statute therefore does not expand cable operator's signal carriage obligations to include digital signals during the transition.

When Congress adopted the must carry rules, it was fully aware that the Commission contemplated an extended transition period during which broadcasters would be transmitting existing NTSC signals and new ATV signals, and yet did not order carriage of both. By the time Congress enacted the 1992 Cable Act, the Commission had released the *Second Report and Order* in the advanced television proceeding, which established the framework for the transition to ATV, including the assignment of interim ATV channels and the requirement that broadcasters "surrender one of [their] two

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[10] 47 U.S.C. § 534(b)(4)(B) (emphasis added).

[11] *See e.g.* MediaOne Comments at 26, GTE Comments at 8, NCTA Comments at 9-10.

[12] Although section 614 explicitly requires the Commission to ensure that cable systems carry broadcast signals which have been modified to conform with the Commission's ATV standards, the constitutionality of such a requirement under existing market conditions is a question that the courts will ultimately have to resolve.

broadcast channels and cease broadcasting in NTSC" when ATV became the "prevalent medium."[13] Originally, the Commission anticipated that this transition period would be 15 years.[14]

Despite the Commission's establishment of this extended transition period, Congress did not provide for mandatory carriage of ATV signals during the transition. Had this been Congress's intent, it would have included a provision specifically mandating carriage of both digital and analog signals throughout the transition. Alternatively, it would have required the Commission, once it established standards for ATV, to initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of broadcast signals that "conform" to such standards. The fact that Congress did not include such provisions strongly suggests that Congress did not intend to extend must carry rights to a station's ATV (that is, digital) signal until the station has completed the transition to digital broadcasting.

This reading of section 614 is the only interpretation that comports with Congress's objective of increasing the "diversity of local voices" by excluding duplicative programming from mandatory cable carriage.[15] As Media One points out, the exclusion of duplicative signals from the must carry requirement was an integral part of the must carry regime, and was specifically cited by Congress in defending the

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[13] *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Second Report and Order/Further Notice of Proposed Rulemaking, MM Docket No. 87-268, 7 FCC Rcd 3340, 3341 (1992) (*Second Report and Order*).

[14] *Id.*

[15] Congress exempted cable operators from carrying duplicative signals because it recognized that "carriage of duplicative signals would do little to increase the diversity of local voices." S. Rep. No. 102-92 at 61; H.R. Rep. No. 102-628 at 94.

constitutionality of its must carry rules.[16] It is inconceivable that Congress intended to extend the must carry rules to digital signals during the transition given that ATV was required to be a simulcast service (which would by definition duplicate analog programming) when the must carry provisions were enacted.[17]

In addition, Congress was keenly aware that mandatory signal carriage raised substantial constitutional issues. Consequently, it made detailed and explicit findings concerning the need for must carry (both in the legislative history and the 1992 Cable Act itself), and went to great lengths to limit the scope and burden of the rules to ensure they would survive anticipated constitutional challenges.[18] It is implausible that Congress could have intended to double a cable operator's signal carriage obligations during what was anticipated (and is likely to turn out) to be an extended transition period without making any findings whatsoever concerning the need for such carriage and the likely impact on cable operators.

The only provision of the Act that specifically refers to the transition period is section 309(j), added by the Balanced Budget Act of 1997, which provides that a station is not required to return its analog spectrum on December 31, 2006, unless 85 percent of the households in the station's market are capable of receiving the station's signal by some means.[19] But that provision confers no authority whatsoever on the Commission to require carriage of digital signals during the transition. What is more, in enacting section

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[16] Media One Comments at 12, citing H.R. Rep. No. 102-628 at 58.

[17] As Media One notes, in the 1992 *Second Report and Order*, the Commission adopted a rule requiring 100 percent simulcasting of a broadcast station's programming on the ATV channel at the earliest appropriate point. Media One Comments at 13, citing *Second Report and* Order, 7 FCC Rcd at 3355.

[18] *See e.g.* H.R. Rep. No. 102-628 at 58; S. Rep. No. 102-92 at 53.

[19] 47 U.S.C. § 309(j).

309(j) in 1997, Congress expressly disclaimed any intent to define the scope of any multichannel video programming distributor's (MVPD's) signal carriage obligation with respect to DTV.[20]

Finally, the Commission's authority to impose digital must carry obligations on cable operators is limited by section 624(f). Section 624(f) precludes the Commission from regulating the provision or content of cable services except as *expressly* provided in Title VI of the Communications Act.[21] Since Congress did not expressly authorize digital must carry during the transition either in section 614, or anywhere else in Title VI, the Commission is obligated under section 624(f) to reject the broadcaster's interpretation of section 614.

III. MANDATORY SIGNAL CARRIAGE DURING THE TRANSITION WOULD BE UNCONSTITUTIONAL.

In its initial comments, Ameritech demonstrated that any extension of the mandatory signal carriage regime to digital broadcast signals would likely be found to be unconstitutional under the Supreme Court's *Turner II* decision.[22]

Broadcasters, of course, take a somewhat different view. Indeed, they claim that immediate, simultaneous carriage of their existing analog and new digital signals (including multicasted DTV signals) is absolutely essential for the transition to digital broadcasting (and the return of analog spectrum) to succeed.[23] They further contend that

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[20] H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess. 577 (1997).

[21] Subject to certain exceptions that are not relevant here, section 624 (f) provides that, "[a]ny Federal agency, State or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title." 47 U.S.C. § 544(f)(1).

[22] Ameritech Comments at 8-28.

[23] NAB Comments at 8.

the transition to digital broadcasting must be a success if the broadcasting industry is to survive in the dawning digital age.[24] In support of their position, the broadcasters assert either that the Commission is bound by the Supreme Court's decision in *Turner II* and Congress's findings concerning the need for must carry,[25] or that digital must carry is constitutional because the benefits of digital must carry significantly outweigh the so-called *de minimis* burdens it imposes on the First Amendment rights of cable operators, programmers and consumers.[26] These arguments are addressed below.

A. Digital Must Carry During the Transition Is Not Necessary To Further An Important Governmental Interest.

The Supreme Court in *Turner II* held that Congress's primary objective in enacting the must carry provisions – preserving the benefits of free, over-the-air broadcasting so as to promote widespread dissemination of information from a multiplicity of sources – was an important governmental interest.[27] A narrow majority of the Court further held that there was substantial evidence supporting Congress's conclusion that, absent mandatory signal carriage, significant numbers of broadcast stations would be denied carriage on cable systems, placing them at risk of serious

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[24] *See* NAB Comments at 8 ("Without the certainty of consumer access to their digital signal via cable, broadcasters, whose analog days are numbered, would view their digital future as bleak.").

[25] *See* NAB Comments at 2-3, and Appendix A (Statement of Jenner & Block) at 12-13 (asserting that, in light of the Court's decision in *Turner II*, "further fact finding by the Commission cannot be justified as necessary to support the constitutionality of the must-carry provisions"); Comments of Association for Maximum Service Television, Inc. at 40 (AMST Comments).

[26] NAB Comments at 25-35.

[27] *Turner II*, 117 S. Ct. at 1184; *Turner I*, 114 S. Ct. at 2469. The Court found the government's other objective, promoting fair competition in the market for television programming, was also an important government interest (*Turner I*, 114 S. Ct. at 2469), but concluded that the must carry provisions were not a narrowly tailored means to achieve this goal. *Turner II*, 117 S. Ct. at 1203 (Breyer, J., concurring), and 1208 (Connor, J., dissenting). Consequently, a majority of the Court held that the infringement on cable operators' First Amendment rights posed by must carry could not be justified as a means to promote fair competition in the market for video programming.

financial harm, and thus threatening the nation's existing free, over-the-air broadcast medium.[28] Neither the important government interests held to justify analog must carry, nor the substantial evidence supporting these interests, support the imposition of a transitional digital must carry requirement. Nor does any other purported government interest.

1. DTV Must Carry During the Transition is Not Necessary to Promote the Goals of the Must Carry Regime.

In their opening comments, the broadcasters argue that the objectives and policy underpinnings of the must carry provisions apply with the same force to the digital signals of broadcasters as they did to their analog signals, and that "precluding cable's expected exercise of its gatekeeper power with regard to DTV signals is as necessary to preserve free, over-the-air television service as it was with regard to NTSC.[29] Recognizing that they lack any evidence to support these assertions, broadcasters, not surprisingly, cling to Congress's nearly decade old findings concerning the need for analog must carry – findings that concern a vastly different marketplace.[30]

The record in this proceeding, however, amply demonstrates that the market has undergone a substantial transformation since Congress's findings, and the financial conditions that justified analog must carry are, consequently, not implicated during the transition. Since 1992, the broadcast industry has continued to thrive and grow. Indeed, local broadcast stations have prospered enormously in recent years. As the Office of

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[28] *Turner II*, 117 S. Ct. at 1195-97.

[29] NAB Comments at 7.

[30] *See e.g.* NAB Comments at 2-3, and Appendix A (Statement of Jenner & Block) at 12-13; AMST Comments at 40.

Communication of the United Church of Christ, Inc., *et al.* (UCC) pointed out, local television stations currently are "experiencing an incredible profit boom," achieving profit margins that often exceed 40 percent.[31] Even poorly performing stations often achieve 30-35 percent profit margins.[32] The Commission itself recently acknowledged that "the sales values of broadcast television . . . properties have increased sharply over the past several years,"[33] which likely is the result of the increasing profitability of broadcast television stations. Moreover, the number of broadcast television stations has continued its upward trajectory, increasing to 1583 stations as of September 30, 1998, from 1550 as of August 1996,[34] confirming that the broadcast industry is expanding, not teetering on the brink of financial disaster as one might conclude after reading the broadcaster's comments in this proceeding.

In addition, the broadcast industry can be expected to flourish and grow into the foreseeable future, and certainly throughout the transition period.[35] Unlike in 1992, there is no threat that stations will be dropped from cable systems and lose their advertising base. Under the existing must carry rules, broadcasters will still be entitled to carriage of

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[31] Comments of UCC, *et al.* (UCC Comments) at 10, citing Forester Research, "The Great Portal Shakeout," March 1998 (reporting that local television stations had 41 percent profit margins).

[32] *Id.*, quoting Bill Carter, "Is Television's Future in This Man's Hands?", *New York Times*, October 4, 1998 at Section 3, p.1 ("even underperforming TV stations often manage to hit 30-35 percent profit margins[, and] continue to be sold at extravagant prices.").

[33] *Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(c)(1) of the Telecommunications Act of 1996*, MM Docket No. 97-247, Report and Order, FCC 98-303 para. 28 (rel. Nov. 19, 1998) ("*Fees for Ancillary and Supplementary Use of Digital Television Spectrum*") (noting that television station values increased about 30 percent between 1996 and 1997) (citing *Broadcasting and Cable*, Apr. 6, 1998 at pp. 80, 82).

[34] Public Notice, Broadcast Station Totals As [sic] September 30, 1998 (rel. Oct. 19, 1998).

[35] Broadcast Ad Group Blasts Cable Audience Claims, COMMUNICATIONS DAILY (September 11, 1998) (citing Mark Fratrik, NAB vp-economist).

their existing analog signals throughout the transition period, and thus will be able to maintain their advertising revenues during the transition.[36] Consequently, a denial of digital signal carriage during the transition would not in any way threaten broadcasters' advertising revenues and financial stability.

Indeed, the transition to digital is likely to further transform the economics of broadcasting by significantly increasing the potential sources of revenue for broadcast stations.[37] As former Chairman Hundt has stated the "digital transmission technology is so supple and flexible that . . . the commercial possibilities are beyond the dreams of avarice."[38] Because local broadcast stations will not only maintain their analog advertising revenue, but also acquire significant new revenue streams from their digital transmissions during the transition period, the Commission could not possibly find that, absent a transitional digital must carry requirement, the broadcasting industry would be in jeopardy.

But market and economic conditions are not the only things that have changed since 1992. Technology too has changed considerably, eliminating the need for mandatory signal carriage as a means to ensure that cable subscribers will have access to digital broadcast signals during the transition. In *Turner II*, the Supreme Court accepted

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[36] However, if the Commission extends must carry rights to digital signals during the transition, it is possible a cable operator that reaches the 1/3 channel cap for must carry stations may exercise its rights under section 614 to drop the analog signal of less popular stations in order to carry the digital broadcast signal of more popular stations. Such a result would hardly comport with Congress's goal of promoting programming diversity, particularly since such digital signals would largely duplicate existing analog signals. Moreover, it is a further reason why the Commission should not mandate DTV must carry during the transition. *See* Comments of International Channel, TV5, TV Asia, *et al.*

[37] Media One Comments at 39.

[38] Reed Hundt, Chairman, Federal Communications Commission, Speech Before the Industry Leadership Conference, Information Technology Association of America, Nashville, Tennessee, October 9, 1995 at 9-10.

Congress's findings about cable's role as a gatekeeper and the inadequacy of input selector, or A/B, switches as a means of ensuring cable subscriber access to over-the-air broadcast signals.[39] Technological and regulatory changes in the years since have rendered those findings totally obsolete. In particular, because of these changes, cable systems can no longer, if indeed they ever could, act as gatekeepers to prevent their subscribers from obtaining access to over-the-air broadcast signals.

As Ameritech and CATA pointed out, input selector switches are now incorporated in all but very low-end television receivers (and other video equipment), and can be accessed easily by remote control.[40] These switches will be a standard feature in most, if not all, DTV receivers.[41] Furthermore, CEMA has developed a comprehensive antenna mapping guide that will be furnished to over 30,000 retailers across the country to facilitate over-the-air reception with DTV receivers.[42] In addition to these developments, advances in antenna technology, significantly increased consumer acceptance of outdoor antennas, and legal and regulatory prohibitions against restrictions on such antennas, ensure that anyone who wants to view DTV broadcast signals can easily and cheaply do so.[43] Consequently, the Commission could not reasonably

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[39] *Turner II*, 117 S. Ct. at 1200-01.

[40] Ameritech Comments at 27-28, CATA Comments at 26-29.

[41] Comments of Thomson Consumer Electronics, Inc. at 24 ("These [input selector] switches . . . will be a standard feature in all of Thomson's DTV receivers, usually located on the receiver's remote control unit . . .") (Thomson Comments).

[42] CEMA Comments at 26.

[43] *See* Ameritech Comments at 27-28, CATA Comments at 26-29. The Commission recently extended its prohibition against restrictions on over-the-air reception devices to rental properties. *Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services*, Second Report and Order, CS Docket No. 96-83, FCC 98-273 (rel. Nov. 20, 1998).

conclude that DTV must carry during the transition is necessary to ensure that cable subscribers and other viewers will have access to over-the-air DTV signals.

Nor could the Commission rely on Congress's findings in 1992 to support the imposition of any transitional digital signal carriage requirement, as NAB and other broadcasters suggest. In the first place, there was no evidence before Congress, and Congress made no findings whatsoever, concerning the need for a transitional digital signal carriage requirement when it enacted the must carry provisions in 1992. More importantly, however, given the changing economics of broadcasting, Congress's findings in 1992 in support of analog must carry are completely irrelevant to the issue of transitional digital must carry in 1998.[44] The Commission itself has acknowledged this point. As the *Notice* indicates, the Commission recognizes that it is "essential to *build a record* relating to the interests to be served by any digital broadcast signal carriage rules, the factual predicates on which they would be based, the harms to be prevented, and the burdens they would impose."[45] Consequently, the Commission can not reasonably conclude that DTV must carry during the transition is necessary to further the government interests held to be important by the Supreme Court in *Turner II.*

2. DTV Must Carry During the Transition is Not Necessary to Further Any Other Important Governmental Interest.

The other argument voiced by the broadcasters to support the imposition of a transitional digital signal carriage obligation is that such a requirement is essential to further Congress's purported goals of promoting the rapid deployment of, and transition

[44] Indeed, broadcasters have not offered any evidence that they would suffer the same financial difficulties cited to support analog must carry.

[45] Notice, FCC 98-153 at para. 16 (emphasis added).

to, digital broadcasting and recovery of analog spectrum.[46] The broadcasters' argument, in essence, is as follows: for the transition to succeed, consumers must buy DTV receivers. But, consumers will be reluctant to buy DTV receivers, which will be enormously expensive in the early years, if they cannot receive all of the DTV signals available in their markets through their cable systems. And if consumers do not buy DTV receivers, broadcasters will not make the investments necessary to make the transition to DTV because advertisers will not purchase advertising for DTV transmissions.[47] The broadcasters therefore conclude that, "[t]he needs of the DTV transition stand as a separate and sufficient government interest, in addition to the congressional rationale underlying the must carry law, for application of mandatory cable carriage requirements for DTV signals during the transition."[48]

This argument must fail for several reasons. In the first place, as Ameritech and others pointed out in the initial round of this proceeding, the Commission may not use this proceeding to establish and promote a new government interest in facilitating the speedy transition to digital not ascribed to section 614 by Congress.[49] Nowhere in the language or legislative history of section 614, or in any of the detailed findings concerning the need for must carry in the 1992 Cable Act, did Congress suggest that section 614 was intended to be a vehicle to promote ATV.[50] It is inconceivable that,

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[46] *See e.g.* NAB Comments at 9, ALTV Comments at 23, AMTS Comments at 3.

[47] *See* NAB Comments at 10-11.

[48] NAB Comments at 9.

[49] Ameritech Comments at 10 n.21; NCTA Comments at 17-18.

[50] NCTA observes that Congress cited five policies and made twenty-one findings to support re-regulation of the cable industry, but not one of these suggests directly or indirectly that Congress intended those

having made such detailed, explicit findings concerning the need for must carry in order to withstand anticipated First Amendment challenges, Congress intended the Commission to use the must carry provisions to promote ATV without explicitly saying so. That being the case, the Commission may not manufacture such a goal in this proceeding, and ascribe it to section 614 to justify the imposition of a transitional digital signal carriage requirement.[51]

Even if the Commission could utilize the must carry provisions to promote a goal not assigned to those provisions by Congress, it could not demonstrate that the transition to DTV is a legitimate, let alone an important, government interest, when the Commission does not have the slightest idea what, precisely, over-the-air DTV will turn out to be. Even the broadcasters themselves have not yet articulated what they plan to do with their digital spectrum, and are still attempting to develop a business model for DTV.[52] ALTV acknowledges that questions regarding "how precisely the new [digital] technical capabilities will be utilized and what specific kinds of services they will provide remain largely to be determined as the result of market experimentation and development still largely in the offing."[53] Similarly, Bob Wright, NBC president, has stated that, "The

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regulations to facilitate the broadcasters' transition to DTV or to promote the broadcasters' use of new technologies or the recovery of analog spectrum. NCTA Comments at 18.

[51] The Commission also must reject the broadcaster's interpretation because, as even the Commission itself acknowledges, the imposition of digital signal carriage requirements would raise substantial constitutional issues. *See* Notice, FCC 98-153 at paras. 15-16. As GTE and BellSouth observe, the Supreme Court has held that federal statutes should be interpreted to avoid substantial constitutional questions. GTE Comments at 7 (citing *Almendez-Torres v. U.S.*, 118 S. Ct. 1219, 1227-28 (1998)), BellSouth Comments at 2 (citing *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464, 467 (1994)).

[52] *Fourth Annual Report*, CS Docket No. 97-141, FCC 97-423 at para. 95 (Jan. 13, 1998) (noting that, "At this time, . . . it is unclear how DTV will develop as a broadcast service for consumers").

[53] ALTV Comments at 3, quoting Haring, John, Strategic Policy Research, *The Economic Case for Digital Broadcast Carriage Requirements* at 2 (Oct. 13, 1998)

business plans for high-definition broadcasting are pretty skinny right now."[54] Ameritech questions how the Commission could reasonably declare that the transition to digital broadcasting is an important governmental interest requiring the imposition of substantial burdens on the First Amendment rights of cable operators when, as Chairman Kennard recently acknowledged, "Nobody knows the answer to the who, what, where, when, and how of digital TV."[55] The answer, of course, is that it could not.

In addition, Congress did not, as the broadcasters vociferously assert, intend to expedite the transition to digital broadcasting by forcing cable operators to carry digital signals. Indeed, section 309(j) of the Balanced Budget Act evidences precisely the opposite intent by establishing an indefinite deadline for the cessation of analog transmission by conditioning it on a station's reaching 85 percent market penetration for its DTV broadcast signal.[56] Had Congress intended to expedite the transition to digital, as the broadcasters suggest, it would not have indefinitely extended the transition in this manner. Plainly, in adopting this provision, Congress intended to leave it to consumers

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[54] *Id.* at 4, quoting "The Two Sides of HDTV: Which Side Will Go First?", *CyberTimes* at 2 (August 29, 1997). Meredith CEO William Kerr also has said that "we haven't figured out a way to make money." *Id.*,"HDTV hits broadcasters in the wallet," *USA Today* [On line] at 1 (posted Nov. 1, 1997). *See also* UCC Comments at 3-6. Although broadcasters have not yet firmly decided how they will use their digital spectrum, several broadcasters have expressed a strong interest in transmitting multicasted streams of SDTV programming. *See e.g.* Sinclair Broadcasting Comments at 2. To the extent they do, it is likely that they will multicast national network programming, much of which is already being carried on cable systems, rather than locally originated programming. Mandatory carriage of such broadcast transmissions would be completely antithetical to Congress's stated objectives of preserving *local*, off-air broadcasting. Ameritech notes in this regard that, under section 614, only *local* stations are afforded must carry rights, and the standard for modifying a station's market depends on its service to the communities at issue. *See* 47 U.S.C. § 614(a), (h).

[55] Remarks of William Kennard, Chairman, Federal Communications Commission, Before the International Radio and Television Society, New York, NY, Sept. 15, 1998.

[56] 47 U.S.C. § 309(j).

and market forces to determine the pace of the transition, rather than to achieve a swift transition by government fiat.

More importantly, even if a swift transition to digital broadcasting were an important government interest, the broadcasters have offered no, let alone substantial, evidence to support their claim that DTV must carry is necessary to further this goal.[57] The Commission, however, cannot rely on the purely speculative claims of broadcasters to impose further burdens on the First Amendment rights of cable operators and programmers. As the Supreme Court admonished in *Turner I*, before it may limit the First Amendment rights of cable operators, the Commission must "do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[58] Consequently, the Commission must have sufficient facts to justify any transitional DTV must carry requirement.

The only reliable indicator of digital broadcastings viability is that provided by television manufacturers, which have designed DTV receivers that can receive digital signals only over-the-air. As CATA points out, consumer electronics manufacturers plainly would not have built such sets if they believed that consumers could not receive

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[57] As GTE points out, "[n]either the Commission nor anyone else at this point in time can provide facts, statistics, economic reports, industry trends, or consumer research to support such claims because digital television has not been launched." GTE Comments at 25. *See also* CATA Comments at 15 ("There can be no factual basis on which to impose [digital must carry] . . . since the subject of all this speculation – digital broadcasting – has yet to be introduced into the public marketplace in any meaningful way.").

[58] *Turner I*, 114 S. Ct. at 271 (citations omitted). *See also Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985) (holding that mere speculation cannot support infringement upon the First Amendment rights of cable operators); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987). The *Century* decision is, as Media One notes, particularly instructive because the Court struck down interim must carry rules (similar to those contemplated here) because they were "predicated not upon substantial evidence but rather upon several highly dubious assertions." *Century*, 835 F.2d at 300.

digital broadcast signals without cable carriage.[59] Because the only hard evidence in the record suggests that over-the-air reception of digital signals is viable, the Commission could not show that a transitional digital signal carriage requirement is necessary to ensure the transition to digital broadcasting.

B. Digital Must Carry During the Transition Would Impose Substantial Burdens on Cable Operators and Programmers.

The broadcasters, led by NAB, also argue that the Commission should not be concerned about the impact of imposing a transitional DTV signal carriage obligation on cable operators, programmers and consumers because, they claim, any such burden would be *de minimis* and only "temporary."[60] In support of their claims, NAB offers a study by Strategic Policy Research, Inc. (SPR). According to NAB, that study shows that cable systems currently have adequate capacity to carry digital signals as they begin to roll out without jeopardizing carriage of existing cable services, and that planned cable system upgrades will easily accommodate added DTV signals throughout the transition, as well as permit the addition of new cable services.[61] NAB even goes so far as to assert that the expanding capacity of cable systems actually *reduces* the relative burden of dual signal must carry from that experienced with the addition of NTSC-only must carry.[62]

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[59] CATA Comments at 16.

[60] NAB Comments at 24-25. Based on the record in this proceeding, the transition to digital broadcasting is likely to be a long one. Indeed, the 85 percent penetration threshold established by Congress for the cessation of analog transmission creates a completely open-ended transition period, and, if the past is any guide, will be far from short as the broadcaster's suggest. *See e.g.* Ameritech Comments at 20 n.51, CATA Comments at 6-11. As a consequence, the impact of any transitional digital signal carriage requirement is likely to be substantial and long-lived.

[61] *Id.* at 25-26.

[62] *Id.* at 26.

As discussed below, NAB's and the other broadcasters' argument minimizes the immediate and profound effect a transitional DTV must carry requirement would have on cable operators and programmers by forcing cable operators to drop existing and planned cable networks from their line-ups. The broadcasters' argument also rests on flawed assumptions regarding potential cable system upgrades. Moreover, it completely ignores the impact on consumers who will receive less diverse programming and be denied the benefits of innovation and competition among cable operators.

1. Digital Must Carry During the Transition Would Impose Immediate and Significant Burdens on the First Amendment Rights of Cable Operators and Programmers Alike.

Contrary to the suggestion of NAB and other broadcasters, establishing a transitional digital signal carriage requirement would impose an immediate and significant burden on cable operators and programmers. In *Turner II*, the Supreme Court found that the imposition of analog must carry requirements would not significantly burden the First Amendment rights of cable operators and programmers because cable operators were already carrying virtually all local broadcast stations, and therefore had to displace few, if any, cable networks.[63] In contrast, cable operators are not currently carrying any digital broadcast signals because only a few such stations are now initiating operations. Every digital signal added thus represents a substantial increase in the number of stations a cable system is required to carry. The imposition of a transitional digital must carry obligation, on top of existing analog must carry requirements, would therefore at least double the burden imposed on the First Amendment rights of cable operators, and could be many times greater.

[63] *Turner II*, 117 S. Ct. at 1198.

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[63] *Turner II*, 117 S. Ct. at 1198.

In addition, cable systems do not, as NAB suggests, currently have sufficient available capacity to carry all the broadcasters' existing analog channels in addition to new digital channels. The result is that must-carry for analog and digital requires cable operators to drop programming. As NCTA correctly points out, a majority of cable systems today are channel locked and have no spare capacity on which to carry digital broadcast signals.[64] For these systems, each digital signal added represents an existing cable network that will have to be dropped. Even for systems that are not channel locked, any new digital signal carried represents one new cable network or other service that cannot be added. Because cable systems certainly have made plans for any spare capacity they may have, preempting such plans to add new digital broadcast signals will constitute as great a burden as being forced to drop existing cable networks.

In Ameritech's case, adding the digital signals of all the local commercial stations in its service areas would force it to drop between two and eight cable networks from the lineup on each of its cable systems – the number of networks that would have to be dropped would significantly increase if Ameritech is also required to carry the digital signals of noncommercial educational (NCE) stations as well.[65] If Ameritech is forced to carry digital signals on their over-the-air channels, even more cable networks would have to be dropped. Because the broadcasters' 6 MHz spectrum allocation does not overlap exactly with the spectrum allocation for cable channels, the inherent channel offset would force two cable channels to be dropped for every DTV broadcast channel

[64] NCTA Comments at 41.

[65] Ameritech would have to drop 8 networks in Chicago, 5 in Cleveland, 3 in Detroit and 2 in Columbus if it is required to carry the digital signals of all the local commercial stations in its service areas. These numbers would increase to 10 in Chicago, 6 in Cleveland, 5 in Detroit and 3 in Columbus if it is required to carrier NCE stations.

carried. In addition, to carry digital signals as part of the broadcast basic tier for those customers receiving only that tier, Ameritech would have to install a series of traps per viewer to ensure that they could receive the digital signals. In either case, the signal quality on adjacent channels would degrade to such an extent that Ameritech would be forced to leave such channels vacant.[66]

As a cable overbuilder, Ameritech must compete with incumbent operators to attract subscribers, and, as a consequence, differentiate its services from those provided by incumbents through innovative programming and other service offerings. Ameritech, therefore, has deployed state of the art, 750 MHz cable systems, and assembled highly attractive packages of popular programming and other services that utilize virtually all of the capacity of those systems. In addition, Ameritech routinely tracks programming requests by its subscribers to ensure that its programming responds to viewer demand. To the extent a transitional digital signal carriage requirement imposes limits on Ameritech's ability to provide such differentiated offerings by forcing it to drop programming demanded by customers to make room for duplicative broadcast programming, it would significantly reduce Ameritech's ability to compete as Congress and the Commission intend.

The impact of any transitional digital signal carriage obligation would also significantly burden the First Amendment rights of cable networks by denying many of them any outlet for their programming.[67] By granting digital broadcast signals

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[66] In addition to degrading signal quality on adjacent channels, the cost of traps would be between $3.50 and $12.00 each, plus labor and installation expenses.

[67] *See e.g.* C-Span Networks Comments at 8 (estimating that 6.33 million households would lose C-Span coverage under a digital must carry regime); BET Holdings Comments at 15-19.

preferential access to limited cable system capacity, such an obligation would displace many existing cable networks in order to make way for digital broadcast signals that will largely duplicate broadcasters' existing analog service or are services which may already be carried by the cable operator, and which only a handful of viewers will be able to view.[68] It would, moreover, deny new cable networks access to the critical mass of systems they need to succeed.[69] As NCTA observes, unlike broadcasters, such networks have no guaranteed access to cable systems and no over-the-air access to television viewers.[70] Consequently, as the comments of many programmers in this proceeding have shown, the imposition of a transitional digital signal carriage requirement would have a significant adverse effect on cable networks.

But the adverse impact of such a requirement would not be limited only to cable operators and programmers. Despite the broadcasters' much avowed interest in promoting the interests of consumers, consumers are likely to be the biggest losers if the Commission imposes a transitional digital signal carriage requirement. To the extent cable operators are forced to drop existing cable networks (or eliminate plans to add new networks or other services) in order to make room for digital broadcast programming that merely duplicates analog programming, program diversity and consumer choice would be

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[68] Several broadcasters have suggested that digital broadcast television may not be viable absent cable carriage because even viewers with outdoor antennas will not be able to receive digital broadcast signals over-the-air. *See e.g.* Comments of Sinclair Broadcast Group, Inc. at 2 (questioning the viability of over-the-air DTV). As discussed below, Ameritech believes that, due to technological advances and regulatory changes, viewers, including cable subscribers, will be able to receive digital broadcast signals over-the-air. If, however, digital television is not viable (either technologically or commercially) as an over-the-air service, there is no basis to treat digital broadcast stations any differently from any other cable programming network. Cable systems are not open video systems, and, therefore, cannot be required to carry any, and all, cable programmers (including digital broadcast stations – if such stations are not viable over-the-air) seeking carriage.

[69] *See e.g.* A&E Television Networks Comments at 45, Discovery Communications Comments at 22-25.

[70] NCTA Comments at 31.

lessened. Such a requirement would also force consumers to pay higher subscriber fees (because of increased costs associated with the retransmission of digital broadcast signals) for signals they will be unable to view without enormously expensive digital receivers. Even if consumers opt for less expensive digital converters when they become available, they will still be forced to spend hundreds of dollars in order to view largely duplicative programming with no appreciable increase in picture quality. Thus, it is clear that, rather than being concerned about the interests of consumers, broadcasters are merely interested in pursuing their own business interests at the expense of cable operators, cable programmers and consumers alike.

2. Potential Cable System Upgrades Do Not Mitigate the Burdens of Imposing a Transitional Digital Signal Carriage Obligation.

Potential cable system upgrades do not, as the broadcasters suggest, mitigate the adverse impact of a transitional digital signal carriage obligation on cable operators. While some cable operators that have upgraded their systems may have some unused capacity, they did not increase that capacity simply to turn it over to broadcasters for largely duplicative digital signals. Rather, they did it to meet consumer demand for innovative video and non-video service offerings (including, as Congress anticipated in section 706 of the Telecommunications Act of 1996, advanced telecommunications capability, [71] competitive telephony services, internet connectivity, and various new digital and analog programming services).[72] Imposing a transitional digital signal

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[71] To the extent that a transitional digital signal carriage requirement impinges on cable operators' ability to provide advanced telecommunications services, such a requirement would be antithetical to Congress's clearly expressed objectives in section 706.

[72] MSTV acknowledges that cable operators are adding capacity "to provide telephony and other interactive voice and data services, as well as broadband video," but asserts that such plans are "irrelevant" and should not be considered by the Commission. MSTV Comments at 53. Clearly, however, such plans are highly

carriage requirement would significantly limit a cable operator's ability to respond to this demand, and deprive consumers of the wide array of new services they want.

The imposition of such a requirement would also create a strong disincentive for cable operators to invest in upgrading their systems. Few operators will invest in system upgrades if they know that, as a consequence, they will be forced to hand over a significant portion of any new capacity to broadcasters for their digital signals.

For these reasons, MSTV's so-called "reasonable" proposal to subject cable operators to a transitional digital signal carriage requirement if they increase system capacity is no answer.[73] As demonstrated above, MSTV's proposal would still impose a significant burden on the First Amendment rights of cable operators and programmers, by limiting cable operators' ability to provide consumers the new video and non-video programming services they desire. It would, moreover, create a strong disincentive in cable operators to invest in system upgrades. Consequently, while system upgrades do increase channel capacity, they do not in anyway mitigate the burdens on cable operators and programmers of requiring dual carriage of digital and analog signals during the transition.

3. SPR's Study Grossly Understates the Impact of Digital Must Carry on Cable Operators.

Even if the Commission could legitimately consider potential cable system upgrades in assessing the impact of imposing a transitional DTV must carry requirement,

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relevant to the issue of whether a transitional DTV must carry requirement would impose a burden on cable operators. Moreover, the Commission and Congress have strongly encouraged and applauded cable forays into telephony and advanced telecommunications markets.

it must reject NAB's contention that cable system upgrades will ameliorate the deleterious effects of such a requirement by expanding system capacity sufficiently to accommodate added DTV channels throughout the transition. To support its contention, NAB relies on an analysis prepared by SPR (the "SPR Study"), which finds that cable system upgrades will increase the average system's channel capacity to between 200 and 500 mixed digital and analog channels. Based on these findings, SPR concludes that the impact of digital must carry during the transition will be *de minimis*, and, if anything, less onerous than that experienced by cable operators with the imposition of NTSC-only must carry in 1992.

As demonstrated below, SPR's study is hopelessly flawed because it relies on incomplete or inaccurate data, incorrect assumptions, and faulty analysis. As a consequence, SPR significantly overstates the increases in cable system channel capacity that will result from system upgrades and underestimates the channel capacity that would have to be devoted to carrying digital broadcast signals. It thus grossly understates the burden of a transitional digital carriage requirement on cable operators.

In particular, SPR's study makes the following errors:

1. The SPR Study fails to include the cable channels currently dedicated to carriage of analog broadcast signals when determining the overall impact of a transitional digital signal carriage requirement on the cable operator. To exclude them from any calculations distorts the actual impact of a transitional digital must carry requirement on cable systems.[74]

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[73] MSTV Comments at 51.

[74] For example, the SPR Study (at 25) discusses a small market cable system operating 50 channels without any digital services of its own. It assumes 10 digital broadcast signals entitled to must carry, and concludes that the must carry burden associated with carrying those signals would be only 20 percent of system capacity (10/50 channels). This example fails, however, to consider the original 10 analog broadcast signals carried by the system. Including them reveals that 40 percent of channel capacity (20/50 channels) is actually dedicated to carriage of broadcast signals. In this case, the cable operator would be entitled to delete 4 broadcast signals from its system to stay below the 1/3 cap.

2. The SPR Study also fails to measure cable system and broadcast channel capacity consistently. While cable systems are assumed to have a capacity that is a function of, among other things, compression ratios and data rates, broadcast signals are incorrectly assumed not to be dependent upon such factors. This is a classic case of comparing "apples to oranges".[75] By failing to properly calculate the broadcast channel capacity, the SPR study grossly underestimates the burden on cable systems.[76]

3. The SPR Study assumes that cable operators will not be transmitting HDTV[77] or high quality SDTV signals, but rather will only be delivering high compression, extensively statistically-multiplexed digital signals at or near maximum bit rates. As a consequence, the study incorrectly assumes a compression ratio of 18 to 1, and thus inflates significantly cable system capacity.[78]

4. The SPR Study also contains one example of an 80 channel cable system that carries nothing but digital channels. However, the very reason for a transition period is that a purely digital broadcast system will not exist until its expiration. And a cable operator will not convert its entire system to digital as long as broadcasters continue to broadcast analog signals. Consequently, SPR's last example is a complete *non sequitor.*

5. The SPR Study also includes conflicting statistics on cable systems from various industry sources. While the authors assert (at 11) that cable system channel capacity has grown since 1985, their data elsewhere indicate that 75 percent of cable systems are still rather small, with 53 or fewer channels (at

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[75] It would be more reasonable to apply like assumptions when calculating cable system and broadcast channel capacity because both broadcasters and cable operators have access to the same technology (signal compression, multiplexing, etc.). Consequently, a broadcaster compressing 4 SDTV services into its 19 Mbps transmission system should be viewed as delivering 4 channels at a bit rate of 4.5 Mbps each. By the same token, a cable system providing 8 digital streams in a 38 Mbps transmission system should be recognized as delivering 8 channels at 4.5 Mbps each.

[76] The SPR Study (at 26) proposes an 80-channel system with 4 digital cable services, 10 broadcast channels, and an 18 to 1 compression ratio. In that case, cable system capacity is actually 318 channels (80 – 4 – 10) + (4 x 18) + (10 x 18). The number of broadcast signals is 200 or 20 + (10 x 18). Comparing apples to apples, the broadcaster actually occupies 200/318 channels, or 62.9 percent. Thus, SPR's example, when correctly weighted and applied, shows a new must carry burden twice that allowed by the statute!

[77] Cable operators are equally interested in exploring the possibilities of HDTV. In addition, some programming services, such as HBO and Discovery, have indicated that they will transmit a HDTV service. Comments of Home Box Office and Turner Broadcasting System, Inc. at 5.

[78] Because signal quality decreases as the compression ratio increases, a more realistic compression ratio would be 8 or 10 to 1.

Figure 1 at 12). Ameritech notes that, in any event, this data is inconsistent with the Commission's data, which indicates that 81.1 percent of cable systems have a capacity of 53 or fewer channels.[79]

SPR greatly exaggerates anticipated increases in cable system channel capacity and understates the capacity that would have to be devoted to carrying digital broadcast signals. It compounds its errors by failing to aggregate the burden imposed by carrying both digital and analog signals in calculating the total burden imposed by a transitional dual carriage requirement. Accordingly, the Commission must reject SPR's analysis, and (as a consequence) NAB's contention, that a transitional digital signal carriage will have a minimal impact on cable operators.

IV. WHERE POSSIBLE, THE COMMISSION SHOULD NOT INTERFERE WITH INDUSTRY EFFORTS TO RESOLVE TECHNICAL ISSUES.

Even if the Commission had authority to impose a transitional digital signal carriage obligation, and such action was constitutional (which it is not), adoption of such a requirement would raise myriad technical and operational issues. In particular, cable carriage of broadcast signals raises complex questions relating to the coordination of multiple technical systems – that is, broadcast transmissions, a cable distribution system, and television receivers.[80] In the analog environment, these systems are standardized, and coordination is, therefore, relatively straightforward. In the new digital environment, however, these systems are still in a state of flux because the relevant industries are undergoing dynamic changes and digital television technology is only now beginning to emerge.

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[79] *Fourth Annual Competition Report*, FCC 97-423 at B-3.

[80] Notice, FCC 98-153 at para. 17.

In this environment, mandated solutions to the complex issues posed by digital signal carriage would be premature and contrary to the public interest because of the risk that such regulatory intervention would lock the relevant industries into existing technologies and stifle the development of new, more efficient technologies. As Chairman Kennard recently acknowledged, "It would be a mistake for the FCC to carve a set of technical standards in stone as some parties have called for . . . 'whatever rules we came up with would have been obsolete before the ink was dry.'"[81] Thus, rather than inadvertently establishing a standard based on obsolete or inefficient technologies, the Commission should generally monitor industry developments to ensure that negotiations concerning industry standards stay on track and include all the relevant parties.[82]

In addition, many technical issues -- relating to system compatibility and the establishment of a standard digital interface, channel positioning requirements, and standards for digital modulation -- are already being resolved through negotiations in industry standards-setting bodies. Therefore, government-mandated solutions to these are unnecessary.

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[81] *Kennard Takes Hands-Off Approach to Digital TV Transition*, TELECOMMUNICATIONS REPORTS DAILY (Nov. 16, 1998) (adding that, "The transition to digital television will go more smoothly if the government stays out of the way and lets the affected industries pave their own way.").

[82] Although Ameritech supports industry-developed, rather than government-mandated, solutions to most of the technical and operational issues associated with cable carriage of DTV signals, it agrees with BellSouth that industry standards-setting working groups, like CableLabs "OpenCable", must be open to all parties. BellSouth Reply Comments at 11-12. Like Bell South, Ameritech has been unsuccessful in its efforts to become involved in Cable Labs. Ameritech's application for membership has officially been denied and further efforts to participate in the standards-setting process have been rejected to date. Ameritech, therefore, supports BellSouth's call for the Commission to direct CableLabs to open the OpenCable working group immediately to participation by competitive providers of multichannel video programming. *Id.*

A. Digital Compatibility – IEEE-1394 Digital Interface Standard.

The recent adoption of a digital interface standard to ensure compatibility between cable digital set-top boxes and digital television receivers amply demonstrates that the relevant industries can and will work together to resolve complex technical and operational issues without Commission intervention. Just last month, NCTA and CEMA announced that the consumer electronics and cable television industries had reached agreement and completed necessary extensions to the IEEE-1394 (or "firewire") specification to ensure compatibility between digital television receivers and digital set-top boxes.[83] This new specification is reflected in CEMA document EIA-775 and OpenCable document OCI-C1, and will now be formally accepted by the relevant standards setting organizations.[84]

In addition, in a joint letter to Chairman Kennard, NCTA and CEMA pledged to continue to collaborate to facilitate the introduction of digital television: "We are pleased to report that our industries are working together to jointly resolve these technological hurdles."[85] Accordingly, without Commission intervention, the relevant industries have made, and will continue to make, significant strides to ensure cable/DTV compatibility, and facilitate the introduction of digital television. As such, the Commission need not intervene at this stage and risk further delay, but rather should simply monitor industry

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[83] NCTA Press Release, "Inter-Industry Consensus Reached on IEEE-1394 Digital Interface Specification" (rel. Nov. 2, 1998).

[84] *Id.*

[85] *Id.*, quoting joint letter of NCTA President Decker Anstrom and CEMA President Gary Shapiro to William Kennard, Chairman, Federal Communications Commission.

progress to ensure that parties do not obstruct implementation of the new compatibility standard.[86]

B. Digital Channel Positioning.

As the Commission recognizes, the new digital broadcast television table of allotments does not correspond to a television station's existing analog channel number.[87] In addition, digital broadcasters and cable systems are using different numbering schemes to identify program streams. Nevertheless, the cable industry is making progress in developing standards for digital channel positioning, which will include appropriate mapping and interface specifications, enabling viewers to locate a particular television station with little difficulty. These solutions, which will likely rely on the Program and System Information Protocol (PSIP), will link a station's digital channel number with its analog channel number. Once industry standards are developed, Ameritech will comply with such standards, and pass through PSIP information contained in digital broadcast transmissions.[88] Consequently, there is little need for the Commission to establish digital channel position requirements at this time.

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[86] Ameritech observes that, despite having participated in establishing the new firewire standard, NAB and MSTV reportedly have suggested in a letter to Chairman Kennard that they will not participate in implementing the new standard unless the Commission establishes a committee (which they hope to lead) to oversee implementation of the standard. *More Digital Madness*, CableFax Daily at 1 (Nov. 12, 1998). Ameritech submits that the broadcasters should not be permitted to do an end run around, or to sabotage, industry standards. Nor should they be heard to complain about a lack of industry standards if they are going to undermine them when they are adopted.

[87] Notice, FCC 98-153.

C. Digital Modulation Standards and Cable-Ready Receivers.

One area in which Commission action may be appropriate is in the development of standards for "cable ready" television receivers and other video equipment in a digital environment. Because consumer electronics manufacturers have designed the current generation of digital receivers to conform only to the VSB modulation standard adopted by broadcasters, these receivers are incapable of demodulating signals transmitted utilizing quadrature amplitude modulation (QAM) technology, which has long been the modulation scheme of choice for cable systems. As such, the current generation of digital receivers is not "cable ready." The Commission, therefore, should consider adopting a "cable ready" standard that requires consumer equipment to be capable of receiving digital signals that are transmitted utilizing QAM.

As the Commission readily acknowledges, different modulation schemes are more efficient, and therefore optimal, for different transmission media.[89] The 8 VSB standard, for example, is optimal for terrestrial broadcast digital television delivery because it reduces multi-path reflection and co-channel interference. In contrast, QAM is optimal for cable operators' transmission media because it permits a higher data transmission rate, and therefore significantly increases cable system efficiency.[90] Thus, the cable and broadcast industries each have chosen the modulation standard that optimizes transmission capacity (and therefore efficiency) and quality for their respective media.

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[88] As discussed below, however, Ameritech rejects any assertion that the Commission should require it to provide mandatory carriage of electronic programming guides.

[89] Notice, FCC 98-153 at para. 22.

[90] *Id.* Some cable operators plan to use 64 QAM, while others, like Ameritech, will use 256 QAM.

In their comments, consumer electronics manufacturers and some broadcasters argue that cable operators should be required to conform to the broadcast modulation standard, and either pass through 8 VSB signals unchanged or remodulate digital broadcast signals back to their original 8 VSB signals for reception by digital receivers.[91] In essence, these parties want the cable industry to bear the cost of the consumer electronics manufacturing industry's decision to build receivers that conform only to the digital broadcast standard, and therefore are not "cable ready".[92]

In support of their position, these parties assert that the cable industry participated in the development of the ATSC DTV standard, which includes specifications for transmission of DTV signals delivered over-the-air using 8 VSB and via cable using 16 VSB.[93] Thus, they seem to suggest that the cable industry is engaged in chicanery in adopting a QAM modulation standard, and that manufacturers reasonably relied on some form of inter-industry consensus in building receivers to conform only to the VSB standard.

As the Commission well knows, however, there never has been any inter-industry consensus concerning the use of VSB, nor has the cable industry ever committed or suggested that it would conform to the 16 VSB standard. To the contrary, the cable industry has consistently (and for some time) expressed its intent to utilize QAM modulation in a digital environment. More than two years ago, before it adopted VSB as the digital broadcast standard, the Commission specifically acknowledged that many

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[91] *See e.g.* CEMA Comments at 21-22, Comments of Thomson Consumer Electronics, Inc. at 18-20 (Thomson Comments), Zenith Comments at 3, NAB Comments Appendix G at 2.

[92] *See* Thomson Comments at 18 ("cable operators must bear the burden of making certain that cable subscribers have access to DTV broadcast signals throughout the DTV transition").

[93] *See* Thomson Comments at 18, ALTV Comments at 14.

cable systems were contemplating adopting QAM modulation in lieu of VSB.[94] And, despite concerns expressed by broadcasters about cross-industry interoperability,[95] the Commission declined to adopt a digital cable standard that conforms to the broadcast standard,[96] consistent with its long standing view that ATV compatibility among alternative media could develop without government intrusion.[97]

In reliance on the Commission's decision not to interfere with the industry standards setting process, and to allow cable operators to develop their own optimal DTV standards, cable operators have expended enormous time, energy and resources to develop and deploy advanced technology relying on QAM to upgrade their systems to digital. Ameritech, for example, has already invested well over $2 million in QAM technology. Further, the two largest manufacturers of set-top boxes are building boxes to utilize QAM as well. Any requirement to pass through 8 VSB signals unchanged or to remodulate to VSB, thus, would be patently unfair because it would prevent cable operators from pursuing their long-standing plans to deploy, and waste their significant investments in, QAM technology.

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[94] *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, MM Docket No. 87-268, Fifth Further Notice of Proposed Rulemaking, 11 FCC Rcd 6235, 6259 (1996) (*Fifth NPRM*).

[95] *Id.* at 6258-59 ("We are aware of concern within the broadcast industry that, for example, cable systems may voluntarily adopt QAM modulation in lieu of VSB modulation . . .").

[96] *See* Notice, FCC 98-153 at para. 22 ("The Commission, however, has not adopted a digital cable standard nor has the industry embraced the use of 16 VSB.").

[97] Indeed, as long ago as 1988, the Commission acknowledged that "there may be benefits to [ATV] compatibility [among alternative media]," but stated that "'we do not intend to retard the introduction of ATV on non-broadcast media, nor do we intend *at this point* to require compatibility among the various media or set specific signal or equipment standards for this purpose.'" *Fifth NPRM*, 11 FCC Rcd at 6258, quoting Tentative Decision and Further Notice of Inquiry in MM Docket No. 87-268.3 FCC Rcd. 6520, 6537 (1988) (Second inquiry) (emphasis added). In the *Fifth NPRM*, the Commission specifically sought comment on whether this view remains correct. Id. Yet it chose not to adopt a digital cable standard when it adopted the broadcast standard.

The "VSB pass through" solution also would waste cable system capacity and increase system and subscriber costs. In the first place, passing a VSB signal through a QAM system would, inherently, be inefficient because QAM permits a higher bit rate than 8 VSB. In addition, because cable frequencies are not aligned with broadcast frequencies, simply passing an 8 VSB broadcast signal through a cable system would require the system to off-set adjacent channels to accommodate the broadcast signals, and thus force it to delete at least two cable channels for every digital broadcast signal added to the system. Such a requirement would force systems to make changes to their set-top boxes to handle VSB signals, which would cost a minimum of $50 per box. In addition, it would significantly expand a cable operator's must carry obligation by potentially forcing the operator to carry ancillary and supplementary services, contrary to the express language of the statute.[98]

Ameritech does not begrudge the broadcast industry's decision to utilize VSB modulation, or the consumer electronics manufacturers' decision to design the current generation of digital receivers to conform only to the broadcast digital standard. Nevertheless, their complaints that they relied on cable adopting a broadcast-compatible modulation technology, or that cable operators are "johnnys-come-lately" who must conform with the established broadcast standard, are unfounded. There is, therefore, no basis for arbitrarily elevating the interests of broadcasters above those of the cable industry.

[98] 47 U.S.C. § 336(b)(3). In addition to being contrary to the statute, such a requirement would raise additional questions about the constitutionality of digital must carry because the Supreme Court specifically relied heavily on the fact that Congress had taken steps to minimize the burden of the must carry regime on cable operators. *Turner II*, 117 S. Ct. at 1198-99.

Consequently, the Commission should reject claims by consumer electronics manufacturers that cable operators should be required to pass through VSB signals unchanged, or remodulate cable signals to VSB. Rather, the Commission should require convergence between QAM and VSB to occur in television receivers, and, thus obligate manufacturers to build QAM-capable (and therefore cable-ready) digital receivers. Moreover, if the Commission requires cable operators to carry digital broadcast stations during the transition period, and before manufacturers deploy cable ready consumer equipment, the Commission should, consistent with the requirement in section 614(b)(10)(A),[99] require broadcasters to compensate cable operators for the costs associated with retransmitting their digital signals to cable subscribers.

V. THE COMMISSION MUST RESOLVE OTHER COMPLEX OPERATIONAL ISSUES CONSISTENT WITH THE LANGUAGE AND GOALS OF THE MUST CARRY PROVISIONS.

Cable carriage of digital broadcast signals also raises many thorny questions concerning the applicability of the must carry rules to digital transmission. These include how the limitation of must carry to a broadcaster's primary video transmission, and the exclusion of ancillary and supplementary services from must carry, should apply in a digital environment. They also include whether broadcasters should be permitted to grant exclusive retransmission consent for their ATSC signals, and whether must carry should extend to electronic program guides. Ameritech addresses these issues in greater detail below.

[99] 47 U.S.C. § 534(b)(10)(A) (requiring broadcast stations to bear the costs associated with delivering a good quality signal to cable systems' headends).

A. Primary Video and Ancillary Services.

Section 614(b)(3)(A) provides that a cable operator shall be required to carry only the primary video of local commercial television stations carried on the system.[100] A complementary provision, section 336(b)(3), provides that no must carry rights shall attach to ancillary and supplementary services.[101] As the broadcasters themselves recognize, the meaning of these provisions, and the issues of what constitutes the "primary video" of a station, and what services are ancillary or supplementary, are integrally linked both with each other and the nature and the scope of the must carry obligation itself.[102]

In their initial comments, the broadcasters assert that any digital programming (including multicasted SDTV video streams) provided to the public for free should be considered the primary video signal of a local station.[103] Concomitantly, they argue that the term ancillary and supplementary services should be limited only to those services for which a subscriber must pay a fee, as opposed to services that are advertising-supported.[104]

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[100] 47 U.S.C. § 534(b)(3)(A) ("A cable operator shall carry in its entirety . . . the primary video, accompanying audio, and line 211 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers."). A comparable provision limits a cable operator's must carry obligation to the primary video for NCE stations as well. *See* 47 U.S.C. § 535(g)(1).

[101] 47 U.S.C. § 336(b)(3) ("no ancillary or supplementary service shall have any rights to carriage under section 614 or 615").

[102] ALTV Comments at 66.

[103] ALTV Comments at 67, MSTV Comments at 28, NAB Comments at 37.

[104] ALTV Comments at 67, MSTV Comments at 28, NAB Comments at 37.

Recognizing that their interpretation of the term "primary video" is inconsistent with the plain language of the statute, the broadcasters assert that the statute is specific to the transmission characteristics of the NTSC signal, and therefore should not be interpreted consistent with its plain meaning.[105] Rather, they argue, the Commission should adopt a "flexible" approach in interpreting the statute to promote their own narrow economic interests, which they incorrectly conflate with the development of DTV and the public interest.[106] MSTV even goes so far as to suggest that the Commission should dispense with the statute altogether, and simply apply so-called "simplified concepts" that fit with its own economic goals.[107] The broadcasters also suggest that the Commission has already determined that the term "ancillary and supplementary services" is limited only to subscription services, and therefore that only subscription services should be excluded from must carry.[108]

As the Commission has previously acknowledged, however, its role is not to pick winners or losers. Nor should it be to rewrite the statute to promote the narrow economic interests of one segment of the video programming market at the expense of others, even if the Commission believes that changes are in the public interest, which, in this case, they are not. Rather, its role is to interpret the statute as written, not as the broadcasters

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[105] ALTV Comments at 66, MSTV Comments at 28, NAB Comments at 38.

[106] ALTV Comments at 67 ("Given the economic risks that are involved, local stations will need flexbility during the early stages of deployment. Narrow definitions, which permit cable to 'strip out' much of the information contained in a station's digital transmission, could impair the economic development of the new service.").

[107] MSTV Comments at 28 ("The most elegant way to implement Congress's goals in the DTV environment would be to reinterpret the terms of Section 614 that do not apply to the digital broadcast transmissions and adopt simplified concepts that honor Congressional intent in the new environment.").

[108] MSTV Comments at 29, citing *DTV Fifth Report and Order*, 12 FCC Rcd at 12821; ALTV Comments at 69-71, NAB Comments at 39.

wish it were written. If the broadcasters are unhappy with the statute, their remedy is to petition Congress to amend it, not to ask the Commission to adopt strained interpretations of the statute that are consistent with neither the plain language nor the goals of the statute, however "elegant" such interpretations might be.

The limitation of must carry only to the primary video of a station shows that Congress did not intend to require cable operators to carry everything a station transmits. As Ameritech pointed out, the very use of the term "primary," which connotes a singular or individual thing, indicates that Congress did not intend to require cable operators to carry multiple streams of video programming broadcast by a station, including both analog and digital signals during the transition, and multiple digital signals afterwards.[109] Rather, Congress used the term "primary" video to distinguish the transmission of certain streams of programming or data from other streams, such as ancillary and supplementary services, which were not entitled to signal carriage.[110]

The broadcasters also generally seek to avoid the import of Congress's exclusion of ancillary and supplementary services from must carry by claiming that the Commission has already determined that free, over-the-air services (including multiplexed program streams) do not constitute "ancillary and supplementary"

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[109] Ameritech Comments at 25. Black's Law Dictionary, Fifth Edition, defines "primary" as "[f]irst; principal; chief; leading," all of which are singular in meaning.

[110] For this reason, the Commission must reject ALTV's absurd assertion that whether a station broadcasts one HDTV channel or multiple SDTV channels, it is a single transmission within the meaning of the statute. ALTV Comments at 67. This interpretation would, by its terms, sweep in any and every service broadcast by a television station, including transmissions (such as ancillary and supplementary services) that are expressly excluded from carriage, because all such services would be part of one multiplexed data stream. Moreover, if ALTV's interpretation were correct, there would have been no need for Congress to require carriage of program-related material, if feasible, because such material would already be subsumed within the term "transmission." That Congress considered it necessary to include such a requirement indicates that not all services or data contained within a multiplexed data stream can be considered to be part of the "primary video transmission" of a broadcast station.

services.[111] In support, they cite the Commission's *Fifth Report and Order* in the advanced television docket, in which the Commission stated "we will consider as ancillary and supplementary any service provided on the digital channel other than free, over-the-air services."[112]

However, the broadcaster's reliance on the *Fifth Report and Order* is entirely misplaced. In the first place, the Commission specifically stated in the *Notice* that its "task here is to define what 'ancillary or supplementary' mean in the context of digital broadcast signal carriage,"[113] implicitly acknowledging that its declaration in the *Fifth Report and Order* is irrelevant here. More recently, the Commission expressly acknowledged that the definition of what is an "ancillary or supplementary" service is contextual, concluding that its decisions concerning the meaning of "ancillary and supplementary" in other contexts are "*not* intended to be directly transferable to the mandatory carriage context."[114]

In addition, the Commission was not considering whether free services would be treated as ancillary or supplementary services in the *Fifth Report and Order*. Rather, the Commission held only that, if a service is not offered free over-the-air, it will be considered an ancillary service. But that is not the same as saying that all free services will be considered as "not ancillary."

The broadcasters' argument is further undermined by the fact that Congress required the Commission to recover regulatory fees only for those "ancillary and

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[111] *See e.g.* NAB Comments at 39-40.

[112] *Id.*, citing *Fifth Report and Order*, 11 FCC Rcd at 12821.

[113] *Notice*, FCC 98-153 at para. 72.

[114] *Fees for Ancillary or Supplementary Use of Digital Television Spectrum*, FCC 98-303 at para. 31 n. 54.

supplementary services . . . for which the payment of a subscription fee is required."[115] If the broadcasters' argument was correct, there would have been no need for Congress to distinguish between ancillary and supplementary services for which a fee is charged and those provided free in establishing regulatory fee categories. Indeed, even ALTV concedes, as it must, that the term "ancillary and supplementary services" extends to more than just pay services.[116]

Having made a distinction between free and subscription "ancillary and supplementary" services for regulatory fee purposes, Congress easily could have made the same distinction for must carry purposes if that had been its intent. Congress, however, did not do this. Rather, it provided that cable operators are not obligated to carry *any* ancillary and supplementary services *period.* Accordingly, the Commission cannot adopt the interpretation proposed by the broadcasters, however "elegant," or rather strained, it might be. The only interpretation of the terms "primary video" and "ancillary and supplementary services" that comports with the language and legislative history of the statute is that a cable operator is not required to carry a *secondary* video stream – which, during the transition, means one or more digital signals in addition to the analog (or primary) signal.

B. The Commission Should Not Permit A Station to Grant Exclusive Retransmission Consent.

In the *Notice*, the Commission states that, when it initially implemented the must carry provisions, it specifically prohibited exclusive retransmission consent agreements

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[115] 47 U.S.C. § 336(e).

[116] ALTV Comments at 69 (stating that "only those ancillary and supplementary services that are provided to subscribers for a fee, should be exempt from must carry requirements.")

between broadcast television stations and cable operators.[117] The Commission asks whether it should revisit this decision.[118]

In its comments, ALTV urges the Commission to reconsider the prohibition on exclusive reconsideration agreements because of uncertainties surrounding the deployment of digital broadcast television.[119] ALTV claims that, because of these uncertainties, local stations should have flexibility to negotiate exclusive retransmission consent agreements for carriage of DTV signals. Specifically, it claims that the increased revenue that may be derived from such arrangements could help stimulate faster deployment of digital services.[120]

Ameritech strongly disagrees with ALTV's suggestion that the Commission abandon its prohibition against exclusive retransmission consent agreements. In adopting the prohibition five years ago, the Commission specifically acknowledged that, in certain circumstances, exclusivity can be an efficient form of distribution, but concluded that, in view of the concerns that led Congress to regulate program access and cable signal carriage agreements, it was appropriate to prohibit exclusive retransmission consent agreements.[121] As a cable overbuilder, Ameritech can vouch for the importance of access

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[117] *Notice*, FCC 98-153 at para. 38, citing *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, MM Docket No. 92-259, 8 FCC Rcd 2965, 3006 (1993) (*Must Carry Order*).

[118] *Id.*

[119] ALTV Comments at 20. Indeed, ALTV asserts, without a hint of irony, that "neither the FCC nor the industry is entirely certain how local over-the-air digital television will be rolled out." *Id.* Ameritech questions how ALTV can make such a statement and, at the same time, maintain that there is substantial evidence that immediate imposition of a dual carriage requirement is essential either for the successful deployment of DTV or to preserve broadcasting generally.

[120] *Id.*

[121] *Must Carry Order*, 8 FCC Rcd at 3006, para. 179.

to programming to the development of competition in multichannel video programming distribution (MVPD) markets, and for the relevance and applicability of these concerns to retransmission consent agreements. Ameritech has repeatedly reminded the Commission that the key to competition in the MVPD marketplace is assembling attractive programming packages for consumers, which competitive MVPDs cannot do without reasonable, nondiscriminatory access to programming, including broadcast programming.[122]

Moreover, the Commission is well aware of the continuing popularity of broadcast television programming.[123] Indeed, broadcast stations are the major outlet for valuable local and national programming, most notably sports programs, which are among the most valuable and highly rated of all programming. For example, CBS carries the NFL and NCAA football; Fox carries the NFL, NHL and Major League Baseball; NBC carries the NBA; and ABC carries NFL and NCAA football. The networks program regionally so that their local affiliates will broadcast the games of home teams, increasing the value of their sports programming to viewers. Broadcast stations also continue to be major outlets for local sports, news and other programming.

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[122] *See e.g.* Comments of Ameritech New Media, Inc., on *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding the Development of Competition and Diversity in Video Programming and Distribution Carriage*, CS Docket No. 97-248, RM No. 9097 at 3 (filed Feb. 2, 1998); Comments of Ameritech concerning *Applications of AT&T Corporation, Transferee, and Tele-Communications, Inc. (TCI), Transferor, for FCC Consent to Transfer of Control Pursuant to Section 310(d) of the Communications Act, as amended, of Licenses and Authorizations Controlled by TCI or its Affiliates or Subsidiaries*, CS Docket No. 98-178 at 25-39 (filed Oct. 29, 1998); Comments of Ameritech New Media, Inc., on *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits, Review of the Commission's Cable Attribution Rules*, MM Docket No. 92-264, CS Docket No. 98-82 at 4 (filed Aug. 14, 1998).

[123] *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, Fourth Annual Report, FCC 97-423 at para. 92 (rel. Jan. 13, 1998) (noting that broadcast television still attracts a large majority of the television audience).

While consumer acceptance of and demand for digital broadcast television is uncertain, to the extent consumers do demand it, the inability of some MVPDs to offer such programming will undermine competition in the MVPD market. In particular, allowing exclusive retransmission consent agreements will impede the efforts of new entrants like Ameritech to offer much needed competition to incumbent operators. Ameritech has previously offered, and the Commission has found, ample evidence that cable operators have used exclusive cable programming agreements for anticompetitive purposes.[124] There is absolutely no reason to believe that incumbent operators would not immediately take advantage of this newly-found weapon and tactically wield it against new entrants for no other reason than to impede competition – a goal at odds with those of Congress.[125] Consequently, the factors that led the Commission to prohibit exclusive retransmission consent agreements apply with equal force to digital broadcast television.[126]

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[124] *See Outdoor Life Network and Speedvision Network Petition for Exclusivity*, CSR-5044-P (rel. June 26, 1998); *Corporate Media Partners d/b/a Americast et al. against FX Networks et al*, CSR-5235-P (rel. April 24, 1998); *Corporate Media Partners d(b)a Americast et al. V Rainbow Programming Holdings, Inc.*; Order, CSR-4873-P (rel. Spet. 23, 1997)

[125] Ameritech notes in this regard that in consideration for retransmission consent broadcasters have already granted incumbent cable operators exclusive distribution rights for affiliated cable programming networks. For example, NBC has declined to provide Ameritech and other new entrants access to its cable programming on MSNBC because of exclusive distribution arrangements with incumbent operators. NBC has, moreover, exacerbated the damage of this denial by cross-promoting MSNBC on its regular broadcast programming. For example, throughout NBC's broadcasts of NFL games (which are retransmitted by Ameritech), it aggressively promotes its post-game show on MSNBC, which Ameritech cannot carry. A similar situation could develop if broadcasters are permitted to grant exclusive retransmission rights for DTV broadcasts.

[126] In addition, ALTV's argument that the Commission permit exclusive retransmission consent agreements is wholly inconsistent with its contention that DTV must carry is essential to promote a swift and successful transition to DTV on the theory that broadcasters must have access to as many viewers as possible to invest in digital broadcasting, and that cable systems are potential gatekeepers that can deny their subscribers access to digital broadcast signals. If one were to accept their hypothesis (which Ameritech does not), permitting exclusive retransmission agreements would deprive many viewers of access to digital broadcast signals, considerably complicating attainment of the 85 percent penetration

C. The Commission Has No Authority to Require Mandatory Carriage of Electronic Programming Guides.

Gemstar International and Starsight Telecast (collectively "Gemstar") urge the Commission to adopt rules which will ensure the unimpeded pass-through of Electronic Programming Guide (EPG) information.[127] Put another way, Gemstar demands EPG must carry. Gemstar offers many conclusory statements ostensibly supporting its position that EPG pass-through is essential to the successful transition from analog to digital broadcasting. However, these statements are speculative at best. More importantly, without arguing the merits of Gemstar's conclusions, the fact remains that there is no legal authority for the Commission to impose EPG must carry.

In the *Notice*, the Commission likens this issue to the channel positioning requirements established in the 1992 Cable Act and asks whether it should adopt rules "to ensure fair competition between" EPGs "controlled by cable operators and those that are controlled by broadcasters."[128] While Congress considered channel positioning to be an integral part of the must carry regime, and therefore adopted comprehensive channel positioning requirements,[129] it evidently did not hold the same view with regard to EPGs. Consequently, even though EPGs were already available in 1992, nothing in the 1992 Cable Act even remotely suggests that cable operators would be required to pass through EPG information. Nothing has changed in this regard.

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threshold for the cessation of analog transmission. The Commission therefore should reject ALTV's argument and decline to reconsider its prohibition of exclusive retransmission consent agreements.

[127] Comments of Gemstar International Group Limited and Starsight Telecast, Inc. at iv (Gemstar Comments).

[128] *Notice*, FCC 98-153 at para. 82.

[129] 47 U.S.C. § 534(b)(6).

While Gemstar attempts to read into section 614(b)(4)(B) general authority to impose EPG must carry obligations on cable operators, its analysis is supported by neither the language nor the legislative history of that section. As discussed above, Section 614(b)(4)(B) simply directs the Commission to amend its rules to ensure that there is no degradation of the quality of signal processing and carriage provided by a cable system to a broadcast station that has completed the transition to advanced television. Because section 614(b)(4)(B) does not expressly authorize the Commission to require cable operators to pass through EPG information, the Commission is precluded by section 624(f) from relying on that provision to adopt such a requirement.[130]

VI. CONCLUSION.

For the reasons stated above, and in our initial comments, the Commission should refrain from imposing a transitional digital signal carriage obligation on cable operators, which would unduly burden cable operators and fail to serve any important governmental interests. In addition, the Commission should permit the relevant industries to resolve complex technical issues, except in the case of standards for cable-ready receivers where further Commission action may be warranted. Finally, the Commission should resolve other operational issues relating to the definitions of primary video and ancillary and supplementary services, the permissibility of exclusive retransmission consent arrangements, and carriage of EPGs consistent with the text and objectives of the must carry provisions.

[130] *See supra* note 22 and accompanying text.

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CERTIFICATE OF SERVICE

I, Anisa A. Latif, do hereby certify that a copy of the Reply Comments of Ameritech New Media, Inc., has been served on the parties attached via first-class mail - postage prepaid, on this 22nd day of December 1998.

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